Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-942

FRANK L. RIZZO, *et al.*, *Petitioners*

v.

GERALD G. GOODE, *et al.*, *Respondents*

HONORABLE JAMES H. J. TATE,
FRANK L. RIZZO, *et al.*, *Petitioners*

v.

COUNCIL OF ORGANIZATIONS ON PHILADELPHIA
POLICE ACCOUNTABILITY AND RESPONSIBILITY, *et al.*,
Respondents

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the
United States Court of Appeals for
the Third Circuit.

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ARGUMENT

Respondents have argued to this Court that the relief granted by the District Court in their favor and against petitioners was a necessary remedy demanded by the evidence and the findings of the Court; that the scope of the relief granted was consistent with the problems found to exist, and that the relief would work no hardship on petitioners. It is in reply to these arguments that your petitioners, defendants below, respectfully submit this brief.

I. In Granting Relief Despite Its Conclusion that Petitioners Did Not Violate any Constitutional Rights of Respondents, the District Court Erred as a Matter of Law.

After exonerating petitioners from charges of unconstitutional conduct and after concluding that the "wrong" which petitioners had committed violated any constitutional rights of respondents, the District Court improperly created a remedy where there was no corresponding constitutional right. The District Court expressly found that petitioners, though accused of implementing departmental policies of racial bias and unconstitutional conduct towards citizens, had not implemented any such policies. [A. 124a, 126a] 357 F. Supp. at 1318, 1319. Further, the District Court refused to find a policy on the part of the petitioners to condone or knowingly tolerate unconstitutional conduct on the part of police officers. The court did find however, that a small minority of police officers, who were never made defendants in either of the cases presently before this Court, had violated the constitutional rights of certain citizens. [A. 123a] 357 F. Supp. at 1318. Had those police officers been defendants, presumably the District Court would have found them liable for their conduct. Finally, the Court found that the Police Department's procedures for the reception of citizen complaints of police misconduct

and for disciplining police officers were "inadequate". [A. 124a] 357 F. Supp. at 1318, 1319. This "inadequacy" of police procedures is the only "wrong" for which the Court found petitioners liable.[1]

Respondents argue that a result of these "inadequate" procedures, petitioners are unable to insure the public that in the future some police officer will not violate the constitutional rights of some citizen.[2] Their position is that since petitioners are unable to insure the public from future, unspecified acts of police misconduct, the continued maintenance of these "inadequate" procedures is, in itself, a violation of the constitutional rights of the citizens.

Both of the courts below posed the question of whether the citizens have the constitutional right which respondents urge exists; *i.e.*, do respondents have a constitutional right to improved administrative procedures for

1. Respondents suggest that the issue of the adequacy of the Department's disciplinary procedures come to the fore only after the presentation of evidence of wrongdoing on the part of individual police officers. [Brief for Respondents, p. 50]. Such an interpretation does not square with the complaints in either the *Goode* or *COPPAR* cases. From the outset of the litigation, a judicial assumption of police department operations, either by mandatory injunction [A. 14a, 21a-22a] or receivership [A. 49a-50a], was the principal issue in each case.

2. At common law, the failure or inability of a municipal police department to provide *adequate* police protection for its citizens has never given rise to a cause of action against a municipality or its law enforcement officials. See generally, *Matyka v. City of Amsterdam*, 15 N.Y. 2d 134, 204 N.E. 2d 635 (1965); *Bass v. City of New York*, 38 App. Div. 2d 407, 330 N.Y.S. 2d 569 (1972); *Huey v. Cicero*, 41 Ill. 2d 531, 243 N.E. 2d 214 (1969); *Henderson v. City of St. Petersburg*, 247 So. 2d 23 (Florida App. 1971); *Simpson's Food Fair v. City of Evansville*, 272 N.E. 2d 871 (App. Ct. Ind. 1971); *Jahnke v. Incorporated City of Des Moines*, 191 N.W. 2d 780 (Supreme Court of Iowa 1971); *Westminster Investing Corp. v. Murphy Co.*, 434 F.2d 521 (D.C. Cir. 1970); *Amato v. City of New York*, 268 F.Supp. 705 (S.D. N.Y. 1967); 18 McQuillan, *Municipal Corporations* [3rd Edition revised] §§53.79 and 53.80.

the reception of citizen complaints of police misconduct and the disciplining of police officers? More basically, the real question is: Does a constitutional right lie in citizens, enforceable in the federal courts, to require improvement, adequacy or efficiency in the performance in office of the citizens' elected governmental officials and their appointees? Both of the courts below answered that question in the negative; both courts emphasized that the respondents had no constitutional right to any improvement in the performance of the petitioner officials.

However, both of the courts below, as well as respondents, argue that in so answering, the courts were only emphasizing that there was no constitutional right to the remedy which the District Court ultimately granted, but that the remedy was appropriate to relieve the constitutional deficiencies found to exist. The fallacy in that illogic is that the "right" which respondents were seeking to enforce and the "right" which the courts did enforce, was the non-existant right to improved procedures. Thus, the District Court created a remedy which did not correspond to any constitutional right in respondents against petitioners.

Respondents cite this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), for the proposition that the broad, mandatory injunctive relief granted by the district court is appropriate in this case. In that case, this Court affirmed a remedy which was designed to end perpetuation of a segregated school system. The remedy was intended to halt a continuing, specific constitutional violation of the rights of readily ascertainable persons. It was not a prophylactic remedy designed to prevent future, unspecified violations of the constitutional rights of unknown persons committed by unknown persons. The defendant officials of the school district were the very persons found to have perpetrated the violation of the plaintiffs' constitutional rights by maintaining a *de jure* dual school system. The policies of the Charlotte-Mecklenburg Board of Education were, *per se*,

violative of plaintiffs' constitutional rights, and the remedy devised in that case immediately and directly ended the unconstitutional conduct. Here, the persons who are culpable for the violation of the constitutional rights of certain plaintiffs were not before the Court, but nevertheless relief was entered against defendants who were found to have *not* participated in the violation of anyone's constitutional rights. Where the Charlotte-Mecklenburg Board of Education was found to have effectuated a deliberate policy in direct violation of the United States Constitution, precisely the opposite was found with regard to defendants here.

Furthermore, contrary to respondents' suggestions, this Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education* does not authorize a remedy where plaintiffs have failed to establish a right against defendants. This Court specifically disavowed such a notion in its decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), reversing a decree which (unlike the instant case) would have directly and immediately ended the constitutional violation there involved; namely, the existence of a segregated school system in the City of Detroit, Michigan. The remedy, massive inter-district busing, would have indisputedly terminated patterns of segregated education in Detroit. Nevertheless, this Court held that the remedy was improper and an abuse of the District Court's discretion because it was imposed on persons and school districts who were not found to have participated in the violation of plaintiffs' constitutional rights. 418 U.S. at 745. Furthermore, like the courts below, the District Court and the Court of Appeals in *Milliken v. Bradley* erred in premising their remedy on desirability rather than constitutionality; that is, the desirability of a certain racial balance rather than on the constitutional right there in question—the right to a unitary school system. 418 U. S. at 740, 746.

The situation is the same here. Although both the *Goode* and *COPPAR* plaintiffs averred that defendants had

implemented a departmental policy to violate the constitutional rights of citizens and had directed and encouraged police officers to violate the Constitution, the District Court expressly refused to find that any such policy, direction, or encouragement existed. The courts below took leave of the fundamental precept to the exercise of the equitable power of the federal courts as set forth in both *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 16, and *Milliken v. Bradley*, 418 U.S. at 738:

> A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy."

II. Assuming Arguendo that any Relief Can Be Properly Granted, the Scope and Effect of the Relief Afforded by the District Court Far Exceeds that Which is Necessary to Remedy the Problems Found to Exist.

In stating the reasons for its finding of "inadequacy" in petitioners' procedures, the District Court listed four "defects" in those procedures which respondents argue are remedied by the relief granted. [A. 128a] 357 F. Supp. at 1320. However, thus viewed, the relief is clearly a remedy for conduct on the part of petitioners which both courts below emphasized did not violate the Constitution of the United States—a remedy untethered to substantive right.

However, upon assuming, arguendo, that it is proper to remedy the unconstitutional conduct of non-parties by imposing relief on party-defendants expressly exonerated from any unconstitutional conduct, it is possible to consider the appropriateness of the remedy in terms of relieving plaintiffs from the actions of the non-party misfeasors and malfeasors.[3] Viewed in such a context, it is clear that

3. Regarding the question of vicarious liability in cases brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, seven of the eight Circuit Courts of Appeal considering the issue,

the remedy is at the same time prophylactic and speculative. The hope is that future, unspecified unconstitutional acts on the part of unknown police officers and directed against persons unknown, will be prevented by the revised police procedures. The price paid by the petitioners for this uncertain remedy is the District Court's arrogation of the rule making power of the Police Commissioner. Petitioners respectfully submit that the district courts are no more equipped to be police commissioners or mayors than they are equipped to be "legislative authorit[ies]", school superintendent[s]."*Milliken v. Bradley*, 418 U.S. at 744 (governors or commanders of units of the National Guard); *Gilligan v. Morgan*, 413 U.S. 1, 8, 10 (1973).

Furthermore, the district courts' findings clearly demonstrate that the remedy is unnecessary and even irrelevant to the conduct of the non-party police officers. The District Court found, from the evidence, that violation of the constitutional rights of citizens occurs most frequently in a context of improper arrest. [A. 122a, 124a], 357 F.Supp at 1317, 1318. However the Court ruled that the Consent Decree, dated December 18, 1972, entered into by defendants herein in the case of *Alexander, et al. v. Rizzo, et al.*, Civil Action No. 70-992 (E.D. Pa.), which ". . . embodies detailed provisions governing police contacts with civilians based on less than probable cause for arrest." [A.68a] 357 F.Supp. at 1292, ". . . should go far to eliminate

Footnote 3—Continued

have refused to impute liability for the unconstitutional conduct of subordinate officers to their superiors absent of finding of the superior's personal participation in or direct personal supervision of that conduct. *Dunham v. Crosby*, 435 F.2d 1177 (1st Cir. 1970); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973); *Brown v. Seilaff*, 474 F.2d 826 (3rd Cir. 1973); *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973); *Draeger v. Grand Central Inc.*, 504 F.2d 142 (10th Cir. 1974); but see *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971).

many of the abuses complained of in the present cases." [A. 128a] 357 F.Supp. 1320. Moreover, insofar as the evidence indicates that the abuses complained of involve the use of excess physical force on the part of police officers, the remedy granted, by its own terms, is inapplicable to such conduct. The District Court's directive provides that citizen complaints, alleging criminal conduct on the part of a police officer (*e.g.*, assault and battery), are to be processed in accordance with a separate police directive which remains unmodified by the Court [App. to Pet. for Cert. 32a].

Therefore, even upon assuming that a court may enter relief against petitioners in order to remedy the conduct of non-parties, the district court's mandatory injunction is an overbroad usurpation of the powers of local government which, for the most part, is admittedly unnecessary.

III. The Petitioners Herein Have Consistently and Continuously Voiced Their Objections to the District Court's Unnecessary Intrusion into Internal Police Procedures.

Respondents suggest that this Court should disregard petitioners' assertions that the District Court's directive would interfere with the overall operations of the Police Department. Respondents argue that the objections were not raised below and that, in any event, there is no intrusion into the police function. The argument that the objections were not raised below is simply false, and the assertion that the Court's decree does not interfere with the operations of the Police Department is mistaken.

From the filing of the first Motion to Dismiss [A. 23a], in the *Goode* case, petitioners have consistently maintained that the relief requested by the *Goode* plaintiffs in their complaint [A. 20a-22a], and ultimately granted by the Dis-

trict Court, represented an unwarranted and improper intrusion into the exercise of discretion of the Police Commissioner. In its March 14, 1973 Opinion, the District Court held that it had the power to enter the relief contemplated by the *Goode* Plaintiffs [A. 124-5a, 127a] 357 F. Supp. at 1318, 1320. Nevertheless the District Court did not enter the relief at that time, rather, it first required the parties to submit proposals for revising police directives regarding the reception of citizen complaints and police discipline. Recognizing that petitioners made the submissions under the duress of an unappealable order, the Court required that the submissions be made entirely without prejudice, a requirement respondents now ignore. [A. 193a-194a]. Further, on two separate occasions, the Court noted that during the settlement discussions, the parties " . . . never came close to agreeing. . . ." on the revisions to be made in the directives. [A. 183a, 190a]. There were no hearings regarding the relief granted; the Court took respondents' proposal, which was first made in their complaint almost four years earlier, and implemented it. Petitioners' objections to the decree were disregarded.

Respondents also argue that the Court's directive would not interfere in any way with police operations and that the requirements of the decree are similar to existing departmental procedures. Any similarity is in form alone, certainly not in substance. In acting pursuant to the decree, the Police Commissioner is acting under threat of contempt of court. Thus, while he has the authority to modify, alter or suspend his own directives as circumstances dictate, that flexibility is lost under a court-imposed directive. Respondents fail or refuse to recognize that police administration pursuant to the mandatory commands of the Court is, *per se*, a substantial interference with departmental operations.

Again elevating form and subjugating substance, respondents suggest that the tribunal created by the decree is actually the Police Board of Inquiry. The Police Board

of Inquiry has never had the function of adjudicating the rights of citizens and of deciding issues of constitutional law. Its sole functions are to act as a fact-finding board for the Commissioner; to adjudicate questions in the realm of its own expertise, that is—whether a police officer had violated the police department's disciplinary code, and to make recommendations to the Commissioner. [A. 70a-71a] 357 F. Supp. at 1293. It is the District Court's order which creates within the Police Department a tribunal, made in the image and likeness of the feedral courts, for the purpose of adjudicating the constitutional claims of citizens against police officers.

The power and the duty to adjudicate complaints of specific acts of unconstitutional conduct on the part of police officers lies first and foremost with the federal courts. *Gilligan v. Morgan*, 413 U.S. 1 (1973); *O'Shea v. Littleton*, 414 U.S. 488 (1974). It should remain there.

Respectfully submitted,

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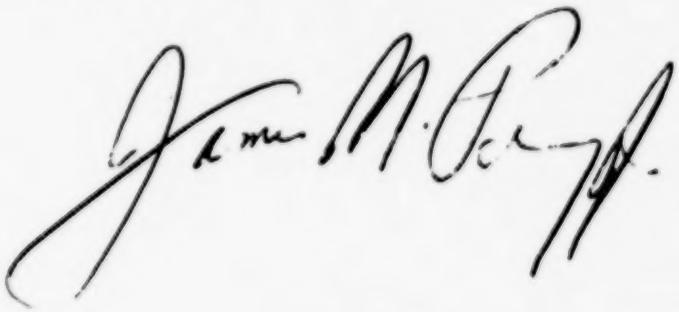
CERTIFICATE OF SERVICE

I, James M. Penny, Jr., Assistant City Solicitor and counsel for petitioners do hereby certify that 3 copies of the Reply Brief for Petitioners were served upon Peter Hern, Esquire, and William Lee Akers, Esquire, counsel for respondents on the 6th day of November, 1975.



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